



**PENNVEST CLEAN WATER PROCUREMENT PROGRAM**

**Public Comment and Response Summary**

**May 11, 2023**

## INTRODUCTION

This document provides the public comments submitted in response to the Pennsylvania Infrastructure Investment Authority's ("PENNVEST") proposed guidance for its Clean Water Procurement Program. This Comment and Response document only contains comments and responses on the guidance posted on the PENNVEST website from March 3, 2023 to May 11, 2023. All other comments are outside the scope of this Comment and Response document.

During the 70-day public comment period, PENNVEST received comments on the guidance document from seven commentators, including individuals, corporations and organizations. The following table lists these commentators. The Commentator ID number is found in parenthesis following the comments in the Comment and Response document. For the purposes of this document, comments of similar subject have been grouped together and responded to accordingly.

### Table of Commentators

Commentator ID#	Name & Organization	Address
1	Marel King Chesapeake Bay Commission	B-63 Main Capital Harrisburg, PA 17120
2	Kelly M. O'Neill Chesapeake Bay Foundation	1426 North 3 <sup>rd</sup> Street, Suite 220 Harrisburg, PA 17102
3	John Nikoloff EnergyWorks Group	Post Office Box 1205 Harrisburg, PA 17108
4	John Nikoloff EnergyWorks Biopower, LLC	Post Office Box 1205 Harrisburg, PA 17108
5	Harry Huntley Environmental Policy Innovation Center	Address not provided
6	Joel Dunn Chesapeake Conservancy	716 Giddings Avenue, Suite 42 Annapolis, MD 21401
7	Hannah Kalk Resource Environmental Solutions, LLC	Address not provided

## GENERAL COMMENTS

- 1. Comment:** Any unused/unencumbered funds from the Procurement Program should transfer back to the Clean Streams Fund. (2)

**Response:** Act 54 of 2022, signed into law by Governor Wolf on July 11, 2022 (“Act 54”), provides for the establishment of the Clean Water Procurement Program (the “CWPP”) for a period of ten (10) years after the effective date of the article (July 11, 2022, P.L. 40, No. 54, § 1613-S). Act 54 is silent on how PENNVEST is to disburse any funds remaining upon the expiration of the CWPP. The initial appropriation of \$22M to the CWPP includes funds made available to the Commonwealth of Pennsylvania (“Commonwealth”) under the American Rescue Plan Act of 2021 (“ARPA”). To the extent ARPA includes requirements on the deadline for the expenditure of funds and the treatment of funds not expended within the allowed time frame, PENNVEST would be required to comply with the requirements of ARPA. At this time, PENNVEST does not anticipate insufficient demand to exhaust the initial allocation of funds, but in the alternative would seek guidance from the U.S. Treasury, who is tasked with administering ARPA funds, on the appropriate distribution on unused ARPA proceeds.

- 2. Comment:** According to Fiscal Code Article 1503-S, “To be approved a verification plan must describe the procedures that can be easily used by the bidder, the department or a technically qualified inspection contractor engaged by the department, to inspect any projects or practices utilized by a bidder and determine the amount of any reduction of nutrients or sediment being achieved under the terms of the contract.” EOT load reductions by a data driven AWTP should be calculated by multiplying the measured nutrient reductions (pollutant prevention amounts) by an adjustment factor such as the statewide EOT/EOS ratio. This procedure can be easily used to achieve consistency and minimize administrative burden by all involved parties yet provide more reliable estimates than current approved methods for unmonitored landscape BMPs that rely on a sequence of uncertain modeling assumptions. (3)

**Response:** PENNVEST believes that the Commentator meant to refer to Section 1610-S (2) of Act 54, rather than Section 1503-S. Nutrient or sediment reduction are defined under Act 54 to include a reduction in nitrogen, phosphorus or sediment pollution that can be directly quantified or modeled using any model approved or accepted by the Pennsylvania Department of Environmental Protection (“DEP”) or the U.S. Environmental Protection Agency. July 11, 2022, P.L. 40, No. 54, § 1602-S. Similarly, the definition of “Verification plan” and “Verified nutrient or sediment reduction” under Section 1602-S of Act 54 rely on “protocol approved or accepted by the department”. “Department” is defined under Section 1602-S of Act 54 as DEP. DEP currently relies on methods approved under the Chesapeake Bay Nutrient Tracking Tool (“CBNTT”) in approving verification plans. To ensure that nutrient and sediment reductions purchased under the CWPP will be eligible under the Conowingo and Chesapeake Bay Watershed Implementation Plans, PENNVEST must rely on the current tool utilized by DEP, the CBNTT. The method suggested by the Commentator is not approved under the CBNTT model and therefore

reductions achieved using this method would not be eligible to apply toward the Chesapeake Bay Watershed Implementation Plan.

- 3. Comment:** A BMP-MTT19 PRA should be certified by the SCC and NRCS; the reductions should be verified by DEP, based a method recommended by SCC and NRCs and approved by EPA. (3)

**Response:** The Commentator suggests that a monitored, multi-year county or regional scale excess manure elimination system should be certified as a new point source PRA category and responsibility for certifying and approving such facilities should reside with the State Conservation Commission and the United States Natural Resources Conservation Service. Under Section 1603-S of Act 54, the CWPP provides for the purchase of verified nutrient or sediment reduction through a competitive bidding process. The definition of “Verification plan” and “Verified nutrient or sediment reduction” under Section 1602-S of Act 54 rely on “protocol approved or accepted by the department”. DEP currently relies on methods approved under the CBNTT in approving verification plans. Monitored, multi-year county or regional scale excess manure elimination systems are not currently an approved method under the CBNTT. Changes to the model or method used by DEP to approve verification plans is outside the scope of the CWPP Guidance.

- 4. Comment:** With the focus of the program being on agricultural pollution reductions, the PA Department of Agriculture and USDA/NRCS should have a clearly defined role in determining priorities, strategies and methods to determine, pay for performance and elimination of N and P pollutants. (4)

**Response:** The role of the State Conservation Commission in the CWPP has been clearly defined by the Legislature and is set forth in Section 1611-S of Act 54.

- 5. Comment:** Please clarify the pollutant of concern for the proposed projects. Total suspended sediment (“TSS”) has been the primary POC used by PA DEP’s MS4 program, with nitrogen and phosphorus being calculated indirectly based upon proposed TSS reductions. The types of sites and resources, as well as restoration approaches, and reduction calculations methods vary depending on the POC. (7)

**Response:** Act 54 provides that the CWPP “shall provide for the purchase of a verified nutrient or sediment reduction” and defines “nutrient” as “Nitrogen or phosphorous” and “sediment” as “Soils or other erodible materials transported by storm water as a product of erosion.” As such, eligible reductions must be either nitrogen, phosphorous, or sediment to qualify under the CWPP. The goal of the CWPP is to help the Commonwealth achieve the most current total maximum daily load limits for nitrogen, phosphorus and sediment as established by the United States Environmental Protection Agency. *See PENNVEST Clean Water Procurement Program Guidance, Page 1, Program Long Term Objectives and Benefits, Paragraph 1.* In order to accomplish that goal, the CWPP prioritizes the purchase of nitrogen, as set forth in paragraphs 1 and 2 of the identified ranking criteria. *See PENNVEST Clean Water Procurement Program Guidance, Page 4, Ranking Criteria, Paragraphs 1 and 2.*

## COMMENTS ON LONG TERM OBJECTIVES AND BENEFITS OF THE CWPP

- 1. Comment:** The focus and objectives of this program should be reduction of agricultural pollution. As such, the Pennsylvania Department of Agriculture, SCC, and NRCS should have a clearly defined lead role in determining priorities, strategies and methods that can be effectively enabled by the program's pay-for-performance approach. Other state and federal agencies should adopt supporting roles to finance and verify water quality and other environmental outcomes. (3)

**Response:** In Section 1603-S of Act 54, the Pennsylvania legislature established the CWPP to "provide for the purchase of a verified nutrient or sediment reduction through a competitive bidding process." Section 1608-S of Act 54 directs that "The criteria for the evaluation of responses to the request for proposals or competitive bidding process under section 1606- S(1) and the weighted percentage to be applied to each factor in the evaluation of the responses shall be determined by the authority in consultation with the department and commission." PENNVEST, pursuant to Section 1608-S, has consulted directly with DEP and the State Conservation Commission ("SCC") at each stage of the development of the CWPP and will continue to consult and collaborate with DEP and SCC during the implementation of the CWPP. Act 54 does not contemplate the direct involvement of federal partners.

## COMMENTS ON FUNDING AVAILABILITY

- 1. Comment:** The program seed funding is insufficient for a multi-year, regional project like the proposed Hillandale-EnergyWorks IEMS. However, subject to the following comments on bidder qualifications and activity eligibility (*see additional comments from Commentator 3 throughout the Public Comment and Response Summary*), the Fiscal Code 1603-S authorization could be extended or replicated to channel additional resources from PA, EPA, USDA, and other sources to fund and administer large scale projects needed to achieve Pennsylvania's long-term water quality and agriculture sustainability objectives. (3)

**Response:** Section 1604-S of Act 54 sets forth the possible sources of funding for the CWPP. To date the only funding that has been provided is the initial appropriation of \$22M to the CWPP from funds made available to the Commonwealth under the ARPA. It should be noted that there are several other possible sources of funds available under Act 54 for the CWPP, including, but not limited to, funds made available from the Clean Streams Fund, federal appropriations, monies received from other governmental agencies, gifts or other contributions from the public or monies returned to the program in the way of interest. PENNVEST, DEP and SCC will cooperate and collaborate with other agencies or entities to maximize the funds dedicated to the CWPP.

## COMMENTS ON QUALIFIED BIDDERS

- 1. Comment:** The commentator appreciates the inclusion of criteria for qualified bidders. (2)

**Response:** No response necessary.

- 2. Comment:** More details are needed to clarify what is needed in the Verification Plans and how they will be evaluated. (2)

**Response:** The CWPP will follow DEP’s current process for verifying the performance of best management practices (“BMPs”) for nutrient or sediment reduction, which can be found at:

[BMP Verification \(pa.gov\)](#).

- 3. Comment:** Can you clarify the process for providing PA DEP with a Verification Plan? Is the intention that this is a document which is submitted to PA DEP and approved in advance of the bid? Is the intention that this document be site-specific or a generalized document that explains the overall methodology and approach to be used in future project? (7)

**Response:** The CWPP will follow DEP’s current process for verifying the performance of BMPs for nutrient or sediment reduction. Information on process for the verification of reductions, and required forms, can be found at: [Nutrient Credit Trading \(pa.gov\)](#). In order to be a Qualified Bidder in the CWPP, the person or Aggregator must have a Verification Plan, as defined under Section 1602-S of Act 54, approved by DEP. *See PENNVEST Clean Water Procurement Program Guidance, Page 2, Qualified Bidders, Paragraph 1.* The required specificity of the overall methodology and approach that will be used to generate nutrient or sediment reductions will be consistent with DEP’s existing process for the approval of Verification Plans.

## COMMENTS ON ELIGIBLE PROJECTS

- 1. Comment:** The commentator is disappointed that eligible projects will be limited to best management practices within the Nutrient Tracking Tool. The enabling legislation (Act 54 of 2022) specifically allows for reductions that can be “directly quantified.” The intent of this provision, along with the requirement for approval of a verification plan, was two-fold: 1) Facilitate the use of innovative practices that are not part of the current modeling tools; and 2) Encourage practices, both traditional and innovative, to be implemented in locations where they would have the highest impact. The current draft would thwart these goals. (1)

**Response:** Section 1606-S of Act 54 states that PENNVEST shall “Issue a request for proposals or initiate a competitive bidding process . . . for the supply of a verified nutrient or sediment reduction toward the achievement of the Chesapeake Bay TMDL.” (emphasis added). The definition of “Verification plan” and “Verified nutrient or sediment reduction” under Section 1602-S of Act 54 rely on “protocol approved or accepted by the department”. DEP currently relies on methods approved under the CBNTT in approving verification plans. Reliance on the CBNTT ensures that all nutrient and sediment reductions can be applied toward the achievement of the Chesapeake Bay TMDL. Changes to the model or

method used by DEP to approve verification plans is outside the scope of the CWPP Guidance. After deliberation, PENNVEST, DEP and SCC, the parties responsible for the administration and implementation of the provisions of Article XVI-S of Act 54, as set forth in Section 1612-S of Act 54, have concluded that reliance on the modeled and accepted reductions as outlined in the CBNTT would allow PENNVEST to best meet the intended goals of Act 54.

2. **Comment:** According to Fiscal Code Article 1603-S pollutant reductions can be directly quantified or modeled using any model accepted by DEP or the EPA. Quantification methods for agricultural pollution reduction activities should be based on technical recommendations of the SCC and NRCS. (3)

**Response:** Section 1606-S of Act 54 states that PENNVEST shall “Issue a request for proposals or initiate a competitive bidding process . . . for the supply of a verified nutrient or sediment reduction toward the achievement of the Chesapeake Bay TMDL.” (emphasis added). The definition of “Verification plan” and “Verified nutrient or sediment reduction” under Section 1602-S of Act 54 rely on “protocol approved or accepted by the department”. DEP currently relies on methods approved under the CBNTT in approving verification plans. Reliance on the CBNTT ensures that all nutrient and sediment reductions can be applied toward the achievement of the Chesapeake Bay TMDL. Changes to the model or method used by DEP to approve verification plans is outside the scope of the CWPP Guidance. After deliberation, PENNVEST, DEP and SCC, the parties responsible for the administration and implementation of the provisions of Article XVI-S of Act 54, as set forth in Section 1612-S of Act 54, have concluded that reliance on the modeled and accepted reductions as outlined in the CBNTT would allow PENNVEST to best meet the intended goals of Act 54.

3. **Comment:** According to Fiscal Code Article 1603-S, “Best management practice” is defined as “A practice or combination of practices determined by the commission or by the Natural Resources Conservation Service of USDA to be effective and practical, considering technological, economic, and institutional factors, to manage nutrient and sediment to protect the surface water and groundwater”. As an example, EnergyWorks’ Gettysburg Energy & Nutrient Recovery Facility has demonstrated that managed manure treatment systems with advanced sensing and information technologies can provide efficient, cost effective, and verifiable prevention of nutrient pollutants. The Chesapeake Bay Program recognizes monitored manure treatment systems as approved nutrient reduction BMP-MTT19. (3)

**Response:** Section 1606-S of Act 54 states that PENNVEST shall “Issue a request for proposals or initiate a competitive bidding process . . . for the supply of a verified nutrient or sediment reduction toward the achievement of the Chesapeake Bay TMDL.” (emphasis added). The definition of “Verification plan” and “Verified nutrient or sediment reduction” under Section 1602-S of Act 54 rely on “protocol approved or accepted by the department”. DEP currently relies on methods approved under the CBNTT in approving verification plans. Reliance on the CBNTT ensures that all nutrient and sediment reductions can be applied toward the achievement of the Chesapeake Bay TMDL. Changes to the model or

method used by DEP to approve verification plans is outside the scope of the CWPP Guidance. After deliberation, PENNVEST, DEP and SCC, the parties responsible for the administration and implementation of the provisions of Article XVI-S of Act 54, as set forth in Section 1612-S of Act 54, have concluded that reliance on the modeled and accepted reductions as outlined in the CBNTT would allow PENNVEST to best meet the intended goals of Act 54.

- 4. Comment:** The current CBNTT is unsuitable for a monitored (BMP-MTT19), multi-year, county/regional scale excess manure elimination system. Such facilities should be designated as Animal Waste Treatment Plants (“AWTPs”) and certified as a new point source PRA category. Responsibility for certifying and approving such facilities should reside in the SCC and NRCS. (3)

**Response:** Section 1606-S of Act 54 states that PENNVEST shall “Issue a request for proposals or initiate a competitive bidding process . . . for the supply of a verified nutrient or sediment reduction toward the achievement of the Chesapeake Bay TMDL.” (emphasis added). The definition of “Verification plan” and “Verified nutrient or sediment reduction” under Section 1602-S of Act 54 rely on “protocol approved or accepted by the department”. DEP currently relies on methods approved under the CBNTT in approving verification plans. Reliance on the CBNTT ensures that all nutrient and sediment reductions can be applied toward the achievement of the Chesapeake Bay TMDL. Changes to the model or method used by DEP to approve verification plans is outside the scope of the CWPP Guidance. After deliberation, PENNVEST, DEP and SCC, the parties responsible for the administration and implementation of the provisions of Article XVI-S of Act 54, as set forth in Section 1612-S of Act 54, have concluded that reliance on the modeled and accepted reductions as outlined in the CBNTT would allow PENNVEST to best meet the intended goals of Act 54.

- 5. Comment:** Use of the current CBNTT isn’t suitable for monitored manure treatment technology BMPs. The Nitrogen and Phosphorus at these facilities are real and measurable. (4)

**Response:** Section 1606-S of Act 54 states that PENNVEST shall “Issue a request for proposals or initiate a competitive bidding process . . . for the supply of a verified nutrient or sediment reduction toward the achievement of the Chesapeake Bay TMDL.” (emphasis added). The definition of “Verification plan” and “Verified nutrient or sediment reduction” under Section 1602-S of Act 54 rely on “protocol approved or accepted by the department”. DEP currently relies on methods approved under the CBNTT in approving verification plans. Reliance on the CBNTT ensures that all nutrient and sediment reductions can be applied toward the achievement of the Chesapeake Bay TMDL. Changes to the model or method used by DEP to approve verification plans is outside the scope of the CWPP Guidance. After deliberation, PENNVEST, DEP and SCC, the parties responsible for the administration and implementation of the provisions of Article XVI-S of Act 54, as set forth in Section 1612-S of Act 54, have concluded that reliance on the modeled and accepted reductions as outlined in the CBNTT would allow PENNVEST to best meet the intended goals of Act 54.

- 6. Comment:** The commentator recommends that PENNVEST allow projects to be eligible whose benefits are not quantifiable via the Bay model if those projects can verify their nitrogen, phosphorus, and sediment reductions. While such applications would likely constitute a small portion of potential projects, this is crucial to allowing innovation. The legislature specifically allowed this when they wrote “*A description of the measures to be used to quantify, by measurement or modeling, the amounts of the reductions of nutrients or sediment resulting from the proposed projects or practices, and a verification plan to verify the reductions, at such times or intervals as the authority or the department shall specify*” without specifying that the Bay model was the only model eligible. One of the key benefits of outcomes-focused programs is encouraging the development of new practices and technologies that may have lower costs but are not yet incorporated into the model. (5)

**Response:** Section 1606-S of Act 54 states that PENNVEST shall “Issue a request for proposals or initiate a competitive bidding process . . . for the supply of a verified nutrient or sediment reduction toward the achievement of the Chesapeake Bay TMDL.” (emphasis added). The definition of “Verification plan” and “Verified nutrient or sediment reduction” under Section 1602-S of Act 54 rely on “protocol approved or accepted by the department”. DEP currently relies on methods approved under the CBNTT in approving verification plans. Reliance on the CBNTT ensures that all nutrient and sediment reductions can be applied toward the achievement of the Chesapeake Bay TMDL. Changes to the model or method used by DEP to approve verification plans is outside the scope of the CWPP Guidance. After deliberation, PENNVEST, DEP and SCC, the parties responsible for the administration and implementation of the provisions of Article XVI-S of Act 54, as set forth in Section 1612-S of Act 54, have concluded that reliance on the modeled and accepted reductions as outlined in the CBNTT would allow PENNVEST to best meet the intended goals of Act 54.

- 7. Comment:** Consider in-stream monitoring to demonstrate load reductions. While this may not be possible due to the time constraints of the program, in the future, longer-term, measured water quality outcomes should be allowable as an alternative to modeled load reductions. Modeled results do not consider project-specific context and may be underestimating load reductions from out-performing projects. Measuring actual in-stream results not only provides more confidence in water quality outcomes, it will also incentivize innovative projects that are strategically sited to outperform models. These measured edge-of-field measurements could then be translated into loading to the Chesapeake Bay using CAST. There are multiple examples throughout the Bay watershed of pay-for-performance programs that allow in-stream monitoring as an accepted performance measure. (6)

**Response:** Section 1606-S of Act 54 states that PENNVEST shall “Issue a request for proposals or initiate a competitive bidding process . . . for the supply of a verified nutrient or sediment reduction toward the achievement of the Chesapeake Bay TMDL.” (emphasis added). The definition of “Verification plan” and “Verified nutrient or sediment reduction” under Section 1602-S of Act 54 rely on “protocol approved or accepted by the department”. DEP currently relies on methods approved under the CBNTT in approving verification

plans. Reliance on the CBNTT ensures that all nutrient and sediment reductions can be applied toward the achievement of the Chesapeake Bay TMDL. Changes to the model or method used by DEP to approve verification plans is outside the scope of the CWPP Guidance. After deliberation, PENNVEST, DEP and SCC, the parties responsible for the administration and implementation of the provisions of Article XVI-S of Act 54, as set forth in Section 1612-S of Act 54, have concluded that reliance on the modeled and accepted reductions as outlined in the CBNTT would allow PENNVEST to best meet the intended goals of Act 54.

- 8. Comment:** With a goal of achieving water quality improvement as quickly as possible, consider adding language to consider applications for projects that have already started, and offer additional points in the ranking system. This will be tremendously appealing to producers and investors alike who are ready to begin implementation as soon as the project is shovel-ready, considering that the program requires projects be shovel-ready at the time of the application. This will also eliminate the risk to PENNVEST that unexpected barriers and delays could prevent awarded projects from moving forward, and guarantee water quality returns more quickly than projects that cannot begin until after the funding is awarded. (6)

**Response:** Pursuant to Page 3, Paragraph 2 of the Ineligible Projects Section of the PENNVEST CWPP Guidance, all reductions realized after October 1, 2023, are eligible for purchase. These reductions could be realized from projects under construction or newly designed projects. As set forth in Paragraph 3 of the Ranking Criteria Section of the PENNVEST CWPP Guidance, available funding will be distributed first to new BMPs, with any remaining funds distributed to existing BMPs until all funds have been exhausted.

- 9. Comment:** Sediment reduction BMPs eligible for MS4 credit in PA have typically required pollutant reductions be calculated based upon site-specific loading data rather than using a default BMP-specific efficiency. Will this same approach be used for calculating and validating reduction value of these BMPs? (7)

**Response:** Pursuant to Section 1606-S of Act 54, PENNVEST will purchase only Verified Nutrient and Sediment Reductions as that term is defined in Section 1602-S of Act 54. Reductions must be calculated using site-specific modeling and must be reviewed by DEP in advance of payment from PENNVEST. The CWPP will follow DEP's current process for verifying the performance of BMPs for nutrient or sediment reduction, which can be found at: [BMP Verification \(pa.gov\)](https://www.pa.gov/government/working-together/programs/bmp-verification).

- 10. Comment:** Verification of nutrient load reductions for these facilities<sup>1</sup> can't be done using models for traditional BMPs. Unmonitored landscape BMPs have many variables and uncertainties that aren't there with data-driven measurable treatment technology facilities. (4)

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<sup>1</sup> It is believed that the Commentator is referring to facilities that implement monitored manure treatment technology best management practices.

**Response:** Section 1606-S of Act 54 states that PENNVEST shall “Issue a request for proposals or initiate a competitive bidding process . . . for the supply of a verified nutrient or sediment reduction toward the achievement of the Chesapeake Bay TMDL.” (emphasis added). The definition of “Verification plan” and “Verified nutrient or sediment reduction” under Section 1602-S of Act 54 rely on “protocol approved or accepted by the department”. DEP currently relies on methods approved under the CBNTT in approving verification plans. Reliance on the CBNTT ensures that all nutrient and sediment reductions can be applied toward the achievement of the Chesapeake Bay TMDL. Changes to the model or method used by DEP to approve verification plans is outside the scope of the CWPP Guidance. After deliberation, PENNVEST, DEP and SCC, the parties responsible for the administration and implementation of the provisions of Article XVI-S of Act 54, as set forth in Section 1612-S of Act 54, have concluded that reliance on the modeled and accepted reductions as outlined in the CBNTT would allow PENNVEST to best meet the intended goals of Article XVI-S of Act 54.

## COMMENTS ON INELIGIBLE PROJECTS

- 1. Comment:** The commentator is extremely pleased to see that eligible practices will be limited to reductions implemented on or after October 1, 2023. It is important that this program be used to support new, additive reductions. (1)

**Response:** No response necessary.

- 2. Comment:** The commentator appreciates the limitation to only purchase reductions not already publicly funded. (2)

**Response:** No response necessary.

- 3. Comment:** Manure is not exported for NPDES permit compliance. The scope of CAFO NPDES permits is limited to liquid discharges and do not address manure solids or volatile releases. (3)

**Response:** No response necessary.

- 4. Comment:** Clean Water Procurement Program pollutant load reductions for the purpose of meeting Chesapeake Bay water quality targets should remain separate and distinct from trading program credits that are generated and administered to facilitate cost effective NPDES permit compliance. As stated on page 63 of the PA Phase 3 WIP, “Pennsylvania generally has limited need for nutrient trading credits and, therefore, nutrient credit sales are limited by permitted entities’ need to buy credits, not the credits generated”. As exemplified by the past flood of no-cost WWTP trading credits, intermingling TMDL pollutant load reductions and NPDES compliance credits can stifle development of pay-for-performance agricultural pollution reduction capacity under the Clean Water Procurement Program. (3)

**Response:** Verified nutrient reduction that is sold or traded as part of DEP’s Nutrient Trading Program is not eligible to be purchased under the CWPP. Conversely, a verified nutrient reduction that is purchased under the CWPP is not eligible for DEP’s Nutrient Trading Program. See *PENNVEST Clean Water Procurement Program Guidance, Page 3, Ineligible Projects, Paragraph 3.*

- 5. Comment:** Fiscal Code Article 1603-S does not exclude CAOs from “Small Farms”. This exclusion should be deleted from the PENNVEST guidance. (3)

**Response:** In response to public comment, the PENNVEST CWPP Guidance has been modified to exclude only the export of manure to meet the regulatory requirements of Act 38 of 2005 (also known as the Nutrient Management Act) for Concentrated Animal Operation (“CAO”) and/or National Pollutant Discharge Elimination System (“NPDES”) Concentrated Animal Feeding Operation (“CAFO”) permitting requirements.

- 6. Comment:** The draft guidelines exclude concentrated animal operations (CAOs). This would effectively rule out most poultry farms from participation – the governing legislation does not exclude CAOs, and the guidelines shouldn’t either! (4)

**Response:** In response to public comment, the PENNVEST CWPP Guidance has been modified to exclude only the export of manure to meet the regulatory requirements of Act 38 of 2005 (also known as the Nutrient Management Act) for CAO and/or NPDES CAFO permitting requirements.

## COMMENTS ON SUBMITTAL PROCEDURE

- 1. Comment:** Clarify that a locally impaired watershed is not larger than a watershed corresponding to a 12-digit Hydrologic Unit Code. (2)

**Response:** Clarification on this point has been added to Page 3, Submittal Procedure, Paragraph 8 of the PENNVEST CWPP Guidance.

- 2. Comment:** The “statement of the qualified bidder’s proposed surety and other financial assurances” and prioritization criterion for fiscal viability of entity may not be needed. Because applicants are not paid until they complete the work, they should not need significant insurance. Outcomes contracts are not like traditional delivery contracts; public money is not at risk, because you don’t have any obligation to pay until the work is completed successfully. Surety and bonding of bidders still make sense because you want to ensure they have delivery capacity, but imposing the same insurance and bonding requirements on an outcomes contract for best management practices on farms as on a wastewater treatment plant loan just doesn’t make sense. This could be fixed by adding/amending the last submittal requirement to read “A statement of the qualified bidder’s proposed surety and other financial assurances **that are appropriate given the intent of the state to only pay contracts after success has been achieved**” and by just making the fiscal tracking criterion reflect this statement. (5)

**Response:** The PENNVEST CWPP Guidance does not require the Qualified Bidder to procure insurance and payment or performance bonds; however, one of the ranking criteria for Technically Qualified Submittals is the fiscal/managerial viability of the entity. *See PENNVEST Clean Water Procurement Program Guidance, Page 5, Ranking Criteria, Paragraph 6.* To the extent the Qualified Bidder has surety or financial assurances in place with regard to the proposed project or practice(s), that information should be included in the Technically Qualified Submittal to maximize the Qualified Bidder's ranking points on this criteria.

3. **Comment:** The commentator suggests reconsidering the requirement that location and ownership agreements be determined ahead of time, as this may be unnecessarily limiting for some projects. Since the state only pays when the projects succeed, providers should be able to say they are going to describe project locations in general terms without having to specify them in the proposal. The ownership submittal requirement could be adjusted to read "A description of the ownership or written agreement with the owner of ~~each~~ **at least** one parcel of land or facility that will be used in implementing the projects". (5)

**Response:** The CBNTT is site-specific. As such, to be measurable and eligible for the CWPP, proposed reductions and BMPs must identify specific locations and demonstrate that the landowner, if not the applicant, consents to the project(s).

4. **Comment:** Ease the ownership submittal and location requirements at the proposal application state. Queuing up owners with specific locations takes significant effort and this could allow the applicant to use awarded funding as needed to both secure new projects and implement them. Consider having documented partnership in a region or other measure of competence to allow more flexibility in allowing projects to move forward as quickly as possible. (6)

**Response:** The CBNTT is site-specific. As such, to be measurable and eligible for the CWPP, proposed reductions and BMPs must identify specific locations and demonstrate that the landowner, if not the applicant, consents to the project(s).

5. **Comment:** Will proof of landowner consent (non-binding) be sufficient to satisfy submittal procedure 5? (7)

**Response:** Generally, the written consent of the landowner, permitting the Qualified Bidder to implement the project or practice(s) that will achieve the proposed nutrient or sediment reduction would be required; however, PENNVEST would review project-specific information on a case-by-case basis to determine if there are unique circumstances that would permit otherwise.

## COMMENTS ON RANKING CRITERIA

1. **Comment:** Ranking criteria should be adjusted to prioritize projects and practices that: 1) reduce both nutrients and sediments simultaneously, 2) provide nutrient and sediment reductions for many years, such as structural practices that passively create benefits over

time, 3) are included in an approved 319 Watershed Management Plan, Source Water Protection Plan, Act 167 Stormwater Management Plan, Chesapeake Bay Countywide Action Plan, and/or the state Phase 3 Watershed Implementation Plan, 4) provide environmental benefits, such increased tree canopy, green infrastructure, and stormwater management in Pennsylvania Environmental Justice Areas (defined by DEP as any census tract where 20 percent or more individuals live at or below the federal poverty line, and/or 30 percent or more of the population identifies as a non-white minority, based on data from the U.S. Census Bureau and the federal guidelines for poverty), 5) quantify the benefits of ecosystem services, especially carbon sequestration, terrestrial and aquatic wildlife habitat improvement, flood mitigation and prevention, and water infiltration, and 6) are located in a Tier 2 Chesapeake Bay County (in addition to the Tier 1 Counties already included). (2)

**Response:** Section 1608-S of Act 54 provides, “the criteria for the evaluation of responses to the request for proposals or competitive bidding process under section 1606-S(1) and the weighted percentage to be applied to each factor in the evaluation of the responses shall be determined by the authority in consultation with the department and commission and be published as part of the request for proposals or competitive bidding process.” Section 1608-S further that “[t]he criteria to be considered must include all of the following:

- 1) A verified nutrient or sediment reduction in a locally impaired watershed.
- 2) A verified nutrient or sediment reduction in a county designated by the department as a Tier 1 Chesapeake Bay county.
- 3) The dollar cost per pound of nutrient or sediment removed.
- 4) The extent to which the project includes small farms.
- 5) The quantity of nutrient or sediment loads anticipated to be reduced.
- 6) The extent to which the project would provide additional community and environmental benefits, including mitigation of flooding, human exposure to toxic substances and climate change.
- 7) Any additional criteria determined relevant and necessary by the authority, department and commission.

Pursuant to Section 1608-S, PENNVEST consulted with DEP and the SCC to develop the proposed criteria and weights in the PENNVEST CWPP Guidance. After review of the public comments received in response to the draft guidance, PENNVEST adjusted various criteria and weights. PENNVEST, in consultation with DEP and SCC, pursuant to their authorities under Section 1608-S, have determined that the final criteria and their respective weighted percentages are appropriate to best meet the intention of Article XVI-S of Act 54.

2. **Comment:** Remove Concentrated Animal Operations (CAOs) from those that are excluded from the “small farm” definition. The legislation creating the Clean Water Procurement Program defined small farms only excludes Concentrated Animal Feeding Operations (CAFOs). CAFOs generally are large operations, while CAOs are simply those with more than 2,000 pounds of animal weight per acre, so some CAOs are small operations with inadequate land for manure application. However, practices required in

their Nutrient Management Plans should not be eligible for Clean Water Procurement Program support. (2)

**Response:** In response to public comment, the PENNVEST CWPP Guidance has been modified to exclude only the export of manure to meet the regulatory requirements of Act 38 of 2005 (also known as the Nutrient Management Act) for CAO and/or NPDES CAFO permitting requirements.

- 3. Comment:** The “Dollar cost per pound of nutrient or sediment removed” should be by far the most important criterion upon which PENNVEST bases its decision to purchase reductions. This is not the case with the currently proposed scoring system. The program’s most similar analogue, the MD Clean Water Commerce Program, awards up to 60% of the scoring points to cost-effectiveness; in its first round of proposals, the CWCP received applications for 4.5 times available funding, overwhelmingly at competitive costs. The pound reductions should be considered as commodities purchased at the lowest price possible, while meeting other considerations. By increasing the emphasis on cost, PENNVEST can further stretch the limited dollars allocated to the program. The commentator has heard from bidders on other projects that they need to know that their efforts to reduce costs will be rewarded in the prioritization system, and the current guidance does not provide that incentive. (5)

**Response:** Section 1608-S of Act 54 provides, “the criteria for the evaluation of responses to the request for proposals or competitive bidding process under section 1606-S(1) and the weighted percentage to be applied to each factor in the evaluation of the responses shall be determined by the authority in consultation with the department and commission and be published as part of the request for proposals or competitive bidding process.” Section 1608-S further that “[t]he criteria to be considered must include all of the following:

- 1) A verified nutrient or sediment reduction in a locally impaired watershed.
- 2) A verified nutrient or sediment reduction in a county designated by the department as a Tier 1 Chesapeake Bay county.
- 3) The dollar cost per pound of nutrient or sediment removed.
- 4) The extent to which the project includes small farms.
- 5) The quantity of nutrient or sediment loads anticipated to be reduced.
- 6) The extent to which the project would provide additional community and environmental benefits, including mitigation of flooding, human exposure to toxic substances and climate change.
- 7) Any additional criteria determined relevant and necessary by the authority, department and commission.

Pursuant to Section 1608-S, PENNVEST consulted with DEP and the SCC to develop the proposed criteria and weights in the PENNVEST CWPP Guidance. After review of the public comments received in response to the draft guidance, PENNVEST adjusted various criteria and weights. PENNVEST, in consultation with DEP and SCC, pursuant to their authorities under Section 1608-S, have determined that the final criteria and their respective

weighted percentages are appropriate to best meet the intention of Article XVI-S of Act 54.

- 4. Comment:** In adjusting the scoring system, not only should the cost be given more weight, but quantity should be given less weight. While size of projects is a mandated scoring criterion and managing a few big projects could have lower administrative costs for PENNVEST than many small projects, the relative weights as drafted are just not appropriate. As written, this scoring system would weigh the program towards paying for one or two big projects that aren't very cost-effective, not an optimal outcome for Pennsylvania streams or the Chesapeake Bay. Based on the commentator's conversations with potential suppliers of water quality outcomes in Pennsylvania, it is possible that PENNVEST could receive single applications for \$10 to \$20 million at a not-unreasonable cost per pound and end up funding just a couple projects, which would erode political support for the program. Assuming that PENNVEST uses something like \$100/lb N, the program could secure 200,000 lbs of N reduction or similar. You could encourage large proposals by adding that proposals for over 10,000 lbs of N reduction will be awarded the full 20 pts, projects of 1,000-10,000 lbs will receive a score between 5-15 pts, proportional to the proposed amount of reduction. Smaller reductions will score fewer points. A system like that is more transparent and ensures that if you receive multiple proposals of over 10,000 lb reductions, that they will compete on private (and location on farms) rather than by size because a 20,000 lb reduction project will score the same (on this criteria) as a 10,000 lb one. (5)

**Response:** Section 1608-S of Act 54 provides, "the criteria for the evaluation of responses to the request for proposals or competitive bidding process under section 1606-S(1) and the weighted percentage to be applied to each factor in the evaluation of the responses shall be determined by the authority in consultation with the department and commission and be published as part of the request for proposals or competitive bidding process." Section 1608-S further that "[t]he criteria to be considered must include all of the following:

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- 3) The dollar cost per pound of nutrient or sediment removed.
- 4) The extent to which the project includes small farms.
- 5) The quantity of nutrient or sediment loads anticipated to be reduced.
- 6) The extent to which the project would provide additional community and environmental benefits, including mitigation of flooding, human exposure to toxic substances and climate change.
- 7) Any additional criteria determined relevant and necessary by the authority, department and commission.

Pursuant to Section 1608-S, PENNVEST consulted with DEP and the SCC to develop the proposed criteria and weights in the PENNVEST CWPP Guidance. After review of the public comments received in response to the draft guidance, PENNVEST adjusted various

criteria and weights. PENNVEST, in consultation with DEP and SCC, pursuant to their authorities under Section 1608-S, have determined that the final criteria and their respective weighted percentages are appropriate to best meet the intention of Article XVI-S of Act 54.

- 5. Comment:** The community and environmental benefits should be given more weight in the scoring system in future years, but the commentator understands why PENNVEST would want to keep the program simpler in its first round. Although the legislation directs the agency to use co-benefits as a scoring criteria, the maximum 3 points for this are unlikely to make the difference in any application. (5)

**Response:** Section 1608-S of Act 54 provides, “the criteria for the evaluation of responses to the request for proposals or competitive bidding process under section 1606-S(1) and the weighted percentage to be applied to each factor in the evaluation of the responses shall be determined by the authority in consultation with the department and commission and be published as part of the request for proposals or competitive bidding process.” Section 1608-S further that “[t]he criteria to be considered must include all of the following:

- 1) A verified nutrient or sediment reduction in a locally impaired watershed.
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- 4) The extent to which the project includes small farms.
- 5) The quantity of nutrient or sediment loads anticipated to be reduced.
- 6) The extent to which the project would provide additional community and environmental benefits, including mitigation of flooding, human exposure to toxic substances and climate change.
- 7) Any additional criteria determined relevant and necessary by the authority, department and commission.

Pursuant to Section 1608-S, PENNVEST consulted with DEP and the SCC to develop the proposed criteria and weights in the PENNVEST CWPP Guidance. After review of the public comments received in response to the draft guidance, PENNVEST adjusted various criteria and weights. PENNVEST, in consultation with DEP and SCC, pursuant to their authorities under Section 1608-S, have determined that the final criteria and their respective weighted percentages are appropriate to best meet the intention of Article XVI-S of Act 54.

- 6. Comment:** It would be good for PENNVEST to provide more clarity on how applicants can earn full or partial points for each criterion. For example, how does PENNVEST determine the score for cost-effectiveness? Do the top 20% of applications receive the same score, or does the most cost-effective project receive more points than the second most cost-effective project? How many more points? If there are a few high-cost outliers (as the commentator has seen in other programs), would they all receive zero points, or

would they skew the scoring system? The commentator would be happy to provide more specific suggestions if PENNVEST articulates its broad preferences. (5)

**Response:** In accordance with Section 1605-S of Act 54, PENNVEST will create an evaluation committee, which shall include representatives of DEP and SCC, to review all responses to the request for proposals or other competitive bidding process. Each member of the evaluation committee will be asked to score the response based on the ranking criteria system set forth in the PENNVEST CWPP Guidance. The majority of the ranking criteria are subjective and based on the facts associated with the proposed response, for example, dollar cost per pound, extent to which the project includes small farms and location; however, other criteria are objective and will be assigned points by each member of the evaluation committee based on their assessment of the Qualified Technical Submittal, for example, fiscal/managerial viability and community/environmental benefits. The evaluation committee will have the opportunity to hear the rationale of other members of the committee prior to finalizing their final determination. This process is consistent with the Commonwealth's process for the procurement of all goods and services.

7. **Comment:** Consider a tiered point system for geography. Currently, the ranking system provides 15 points for projects within Lancaster and York Counties, with zero points in this category outside of these counties. This may result in fewer applications to the program. Not only is it discouraging to partners outside of these two counties who may refrain from submitting applications due to an expected lower chance of success, but practitioners in Lancaster County are currently experiencing capacity constraints. An alternative ranking system could be 15 points for Tier 1 counties, 10 points for Tier 2 counties, and 5 points for Tier 3 counties; however, because the CAST model already considers geography when generating load reductions, geography is essentially double counted in the scoring system. (6)

**Response:** This recommendation has been added to the PENNVEST CWPP Guidance on Page 4, Paragraph 4 under Ranking Criteria.

8. **Comment:** The scoring criteria should give more weight to community and environmental benefits than the three points allotted currently. The legislation directs PENNVEST to use co-benefits in the scoring criteria. Giving more weight to community and environmental benefits will incentivize practices and projects that achieve the desired outcome of restoration efforts which are more holistic than the near-term targets of nutrient and sediment load reduction. The longer-term goal of the Chesapeake Bay Watershed Agreement is to restore, enhance and protect a network of land and water habitats to support fish and wildlife, and to afford other public benefits, including water quality, recreational uses and scenic value across the watershed. Migratory fish populations in Chesapeake Bay freshwater rivers and streams. Giving higher weight to co-benefits will also help curb applications which may prioritize only cost-effectiveness (perhaps incentivizing with missed opportunities to implement ecologically-important but less cost-effective practices at the same site). (6)

**Response:** Pursuant to Section 1608-S, PENNVEST consulted with DEP and the SCC to develop the proposed criteria and weights in the PENNVEST CWPP Guidance. After review of the public comments received in response to the draft guidance, PENNVEST adjusted various criteria and weights. PENNVEST, in consultation with DEP and SCC, pursuant to their authorities under Section 1608-S, have determined that the final criteria and their respective weighted percentages are appropriate to best meet the intention of Article XVI-S of Act 54.

9. **Comment:** Will BMP selection prioritize projects which provide perpetual (permanent) reductions? Some BMPs require extended validation intervals beyond 2026 – will the bidders be required to provide a funding mechanism for long-term operations and maintenance? (7)

**Response:** The Qualified Bidder is able to include a projection of all nutrient and sediment reductions that will be generated from the project or practice(s) through the end of 2026 in calculating the dollar cost per pound referenced in Paragraph 1 of the Ranking Criteria on Page 4 of the PENNVEST CWPP Guidance. Therefore, they will receive credit for any project or practice(s) that provide ongoing reductions. While the Qualified Bidder is not able to receive credit for reductions beyond 2026 under the current source of funding made available for the CWPP, PENNVEST may be able to make adjustments to accommodate perpetual or permanent reductions for future funding sources.

## COMMENTS ON FINANCING TERMS

1. **Comment:** The commentator understands that the program’s initial source of funding, the American Rescue Plan Act, requires the money to be spent by December 31, 2026, and that the proposed contract term is driven by this deadline. However, when other sources of funds become available the commentator encourages the use of contracts with a longer term up to the statutory limit of ten years. (1)

**Response:** PENNVEST will take this comment under advisement for future funding rounds of the CWPP.

2. **Comment:** A 3-year contract term is insufficient to attract private sector investment and will not produce meaningful progress toward 2025 TMDL reduction goals. The guidance should be provided for up to a 10-year contract term, subject to availability of increased funding. (3)

**Response:** The initial appropriation of \$22M to the CWPP includes funds made available to the Commonwealth under the ARPA. Pursuant to the Department of the Treasury’s ARPA Final Rule, codified at 35 CFR Part 35.5, ARPA funds must be disbursed no later than December 31, 2026. In the event of additional funds being allocated to the CWPP, future funding rounds may offer longer contract terms.

3. **Comment:** While the commentator understands the vagaries of funding going forward, a three-year contract term won’t attract private sector investment, nor will it accomplish

meaningful progress. The guidance should be provided for up to 10-year contracts subject to funding availability. (4)

**Response:** The initial appropriation of \$22M to the CWPP includes funds made available to the Commonwealth under the ARPA. Pursuant to the Department of the Treasury's ARPA Final Rule, codified at 35 CFR Part 35.5, ARPA funds must be disbursed no later than December 31, 2026. In the event of additional funds being allocated to the CWPP, future funding rounds may offer longer contract terms.

4. **Comment:** The clause that limits purchase agreements to a term not exceeding December 31, 2026 does not appear to have a basis in statute and could hamper water quality improvements. The goal of this program as created in statute is to pay for environmental benefits only after they have occurred, under contract terms of up to 10 years. Some potential projects (such as forest buffers) may require more than three years to begin generating benefits, and this provision would require PENNVEST to pay before the projects produce benefits or would exclude these long-term BMPs entirely. Even for projects that begin generating benefits in less than three years, this provision would shift payment to earlier in the lifespan against legislative intent. PENNVEST could even go further to guarantee project success by awarding prioritization points to proposals that structure payments to occur after project construction and success. (5)

**Response:** The initial appropriation of \$22M to the CWPP includes funds made available to the Commonwealth under the ARPA. Pursuant to the Department of the Treasury's ARPA Final Rule, codified at 35 CFR Part 35.5, ARPA funds must be disbursed no later than December 31, 2026. In the event of additional funds being allocated to the CWPP, future funding rounds may offer longer contract terms.

5. **Comment:** Please consider timelines for this RFP in conjunction with other state programs like Growing Greener and 319. Organizations applying for these programs will be hard pressed to put forth strong proposals to overlapping deadlines. Provided several state funding programs have applications open between April with deadlines in June, extending the application deadline for the CWPP to August or September will likely result in a larger number of applications submitted and help practitioners better manage an already heavy workload. (6)

**Response:** PENNVEST anticipates an application deadline in late summer or the fall of 2023.

6. **Comment:** Does the program require or incentivize specific wage rates or disadvantaged business enterprises? (7)

**Response:** The program does not require nor incentivize specific wage rates or disadvantaged business enterprises; however, PENNVEST will be required to comply with the terms applicable to the underlying source of funds or appropriation.

7. **Comment:** In the event that a submittal is based upon a preliminary design and the final constructed/validated project provides a different quantity of pollutant reduction, is there a process for adjusting the award? (7)

**Response:** Pursuant to Section 1606-S of Act 54, PENNVEST will purchase only Verified Nutrient or Sediment Reductions as defined in Section 1603-S of Act 54. In the event that a project or practice(s) realize reductions in an amount less than the estimate provided in the Technically Qualified Submittal, PENNVEST would withhold the portion of the payment associated with reductions the Qualified Bidder failed to produce. *See* Section 1606-S (3)(iv).